

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**  
**PROVIDENCE, Sc.**

**DISTRICT COURT**  
**SIXTH DIVISION**

**John D. Luongo**

**v.**

**Department of Labor & Training,**  
**Board of Review**

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**A.A. No. 13 - 051**

**ORDER**

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 13<sup>TH</sup> day of May, 2013.

By Order:

\_\_\_\_\_  
/S/  
Stephen C. Waluk  
Chief Clerk

Enter:

\_\_\_\_\_  
/S/  
Jeanne E. LaFazia  
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT COURT  
SIXTH DIVISION

John D. Luongo :  
 :  
v. : A.A. No. 13 - 051  
 :  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this case Mr. John D. Luongo urges that the Board of Review of the Department of Labor and Training erred when it dismissed his appeal from a decision of a referee because it was filed after the expiration of the statutorily established appeal period. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons that follow, I recommend that the decision issued by the Board of Review in this case be affirmed.

## I. TRAVEL OF THE CASE

The travel of the instant case may be briefly stated: Mr. Luongo worked for Bank of America until he quit on or about May 2, 2011. He applied for and received unemployment benefits until, on October 10, 2012, a designee of the Director of the Department of Labor and Training issued a decision finding him to be disqualified from receiving further benefits because he left the bank's employ without good cause as defined in Gen. Laws 1956 § 28-44-17. See Decision of Director, October 10, 2012, at 1 contained in the record. The Director also ordered repayment of \$ 21,198.00. Id.<sup>1</sup>

Mr. Luongo appealed from these orders and a hearing was scheduled before Referee Nancy Howarth on November 13, 2012; however, Mr. Luongo failed to appear at the hearing. Accordingly, she dismissed the Claimant's appeal for want of prosecution. Mr. Luongo filed an appeal by e-mail on January 29, 2013 — more than sixty days after the fifteen-day appeal period had expired. In that e-mail he explained why his appeal was late:

\* \* \* I was separated from my wife at the time of the hearing and

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<sup>1</sup> In point of fact, the Director issued three virtually identical decisions — apparently divided by benefit year. The amount of restitution given is the aggregate figure. The Referee and the Board of Review likewise issued three opinions when they, in turn, each reviewed the case.

was not given all of my mail thus I was not given all of my mail thus I missed the hearing. I just reconciled with her and just received this notification on January 27, 2013. I would still like to be heard and want to schedule another appointment. What is my next step in this process? Thanks.

E-mail Sent by John D. Luongo to borinfo@dlt.state.ri.us, Marked "Received Jan 29 2013."

The Board of Review viewed this communication as an attempt to file a late appeal. In response — and notwithstanding the fact that Mr. Luongo explained the reason his appeal was late in his e-mail — the Chairman of the Board of Review (Mr. Thomas J. Daniels) sent Mr. Luongo a letter dated February 5, 2013 in which he cited the fifteen-day appeal period enumerated in section 28-44-46 and asked Mr. Luongo to explain in writing why his appeal was so tardy.

Mr. Luongo responded in a handwritten letter dated February 13, 2013 which was received by the Board of Review on February 19, 2013. The body of the letter states as follows:

Good morning Thomas I just received this notice on 2/13/13. The reason I am looking to file a late appeal is for the following reasons: My wife and I were separated for over 1 year and I was not receiving all my mail. Thus I did not receive the notice for the November 28, 2012 hearing. I am asking that my appeal to please be heard on another date.

Letter Sent by J.D. Luongo to Chairman Daniels, Marked “Received Feb 19 2013.”

After receiving this message the Chairman and the Member Representing Industry issued — on behalf of the Board of Review — a decision denying Mr. Luongo’s appeal. They held that “The claimant has failed to justify the late filing of the appeal in the instant case and the appeal is denied and dismissed.” Decision of Board of Review, March 1, 2013, at 1. From this decision the Member Representing Labor dissented, commenting that the tardiness of Claimant’s appeal had been justified by his representation that he had not received the Referee’s decision in a timely manner. Id. Mr. Luongo filed a timely appeal in the Sixth Division District Court on March 19, 2013.

## **II. STANDARD OF REVIEW**

The standard of review by which this court must consider appeals from the Board of Review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

### **42-35-15. Judicial review of contested cases.**

\* \* \*

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the

case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “\* \* \* may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’”<sup>2</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>3</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result<sup>4</sup>

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<sup>2</sup> Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

<sup>3</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

<sup>4</sup> Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

\* \* \* eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

### **III. APPLICABLE LAW**

The time limit for appeals from decisions of the Referee (referred is set by Gen. Laws 1956 § 28-44-46, which provides:

After a hearing, an appeal tribunal shall promptly make findings and conclusions and on the basis of those findings and conclusions affirm, modify, or reverse the director's determination. Each party shall promptly be furnished a copy of the decision and supporting findings and conclusions. This decision shall be final unless further review is initiated pursuant to § 28-44-47 within fifteen (15) days after the decision has been

mailed to each party's last known address or otherwise delivered to him or her; provided, that the period may be extended for good cause.

(Emphasis added). Note that while section 46 includes a provision allowing the 15-day period to be extended (presumably by timely request), it does not specifically indicate that late appeals can be accepted, even for good cause. However, in many cases the Board of Review (or, on appeal, the District Court) has permitted late appeals when good cause was shown.

#### **IV. ANALYSIS**

As we have seen, Mr. Luongo committed two procedural miscues during the travel of this case — first, he failed to appear for his hearing before Referee Howarth; second, he failed to perfect a timely appeal from the Referee's decision. Since our role is limited to reviewing the decisions of the Board, and the Board ruled only on Claimant's second omission, we shall focus our attention firstly (and mainly) on that issue.

##### **A.**

The issue before the Court is whether the Board of Review's finding — viz., that Claimant's failure to receive notice of the Referee's decision did not constitute good cause for his late appeal — was supported by substantial evidence of record or whether it was clearly erroneous or affected by other

error of law. The time limit for the taking an appeal from a decision of a Referee to the Board of Review is established in Gen. Laws 1956 § 28-44-46 to be fifteen days. On page 2 of the Referee’s decision is a section headlined “APPEAL RIGHTS” in which the 15-day appeal period is clearly explained. But, as we have noted, Mr. Luongo denied he had actual notice of the Referee’s decision in a timely manner. He repeatedly attributed this to the fact that he had separated from his wife — and, by unexpressed implication, that she failed to forward all his mail to him.

**B.**

As noted above, a majority of the Board of Review found, in a conclusory manner, that Claimant “failed to justify” the lateness of his appeal. Decision of Board of Review, March 1, 2013, at 1. Although the Board was not specific about the findings of fact underlying this decision, I view it not as a rejection of the credibility of the Claimant’s excuse, but as a determination that it was — even if true — inadequate as a matter of law. And with such a finding I must agree.

In his statements Mr. Luongo implies that for a year he had been out of the marital domicile, which we infer (from a review of the record) was 117 Salina Street, Providence. But if his absence from this address caused his

failure to receive communications from the Board (and its Referees), who must bear the blame? In my view, the ineluctable answer is — Mr. Luongo.

Mr. Luongo stated he had been separated from his wife for a year and was not getting all his mail. But when he appealed from the Director's decisions — seemingly within that one-year time frame — he used the Salina Street address. He never changed the address with the Board of Review. And, he apparently did not contact the Board to inquire if a hearing had been set or if a decision had issued. One would think he would have become concerned well before the end of January. And so, at the end of the day, we must say that Mr. Luongo was the person chiefly responsible for his problems in receiving mail from the offices of the Board of Review. And it flows from such a finding that Mr. Luongo's failure to file a timely appeal was not predicated upon objective "good cause" but on a subjective failure to communicate his current address to the Board of Review.

### C.

As indicated above, Referee Howarth had dismissed Mr. Luongo's first-level appeal because he failed to appear for a hearing on November 13, 2012. Mr. Luongo explained his failure to appear in the same manner that he explained his tardy appeal — he was not receiving his mail.

The Board of Review, like its Referees, or any adjudicatory body, has every right to regulate its proceedings and to take appropriate action when parties fail to comply with its established procedures. A dismissal for failure to prosecute is categorically a reasonable response to a litigant's failure to appear at a duly scheduled hearing, unless a sufficient excuse has been presented. And, for the reasons I enumerated in Section IV-B, supra, I find this excuse to be insufficient. Accordingly, I cannot find that the Referee's dismissal of his appeal constituted an improper exercise of discretion or an improper procedure.

**D.**

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board of Review must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board of Review as to the weight of the evidence on questions of fact.<sup>5</sup> Stated differently, the findings of the agency will be upheld

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<sup>5</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

even though a reasonable mind might have reached a contrary result.<sup>6</sup> In addition, the procedure followed by the Board of Review must not have been unlawful. Gen. Laws 1956 § 42-35-15(g)(3).

Accordingly, because I believe the Board of Review's decision to dismiss Mr. Luongo's appeal for lateness was not clearly erroneous, I believe the decision of the Board of Review must be affirmed.

### **V. CONCLUSION**

Upon careful review of the record, I recommend that this Court find that the decision of the Board of Review was not clearly erroneous and was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4).

Accordingly, I recommend that the decision of the Board of Review be **AFFIRMED**.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph P. Ippolito  
MAGISTRATE

MAY 13, 2013

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<sup>6</sup> Cahoone, *supra* n. 5, 104 R.I. at 506, 246 A.2d at 215 (1968). See also Gen. Laws § 42-35-15(g), *supra* at 4-5 and Guarino, *supra* at 5, n. 2.

